UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

EDWARD J. ANDRESS,
Plaintiff,

vs Case No. C-1-93-207

MARVIN T. RUNYON
POSTMASTER GENERAL
UNITED STATES POSTAL SERVICE
Defendant.

REPORT AND RECOMMENDTION

This case is before the Court upon defendant's motion for summary judgment (doc. 3), plaintiff's motion to strike (doc. 4), plaintiff's motion for summary judgment (doc. 8), plaintiff's motion for preliminary injunction (doc. 14), and following a hearing on said motions.

In 1989, plaintiff filed an action in this Court against the Postmaster General, claiming handicap discrimination. *See Andress v. Frank*, Case No. C-1-89-511. Prior to trial, on December 12, 1990, this case was settled.

On June 14, 1991, plaintiff was removed from his postal employment due to an altercation with a

black employee, Charles Worsham. Plaintiff who is white, challenged his removal on the basis of handicap and race discrimination. He pursued his case before the Merit Systems Protection Board (MSPB), which denied his claim after a hearing. On April 22, 1992, the MSPB denied plaintiff's petition to review its November 27, 1991 decision. Also on April 22, 1992, the

MSPB notified plaintiff that, if he did not request a review by the Equal Employment Opportunity Commission, he must file any civil action in this Court no later than thirty calendar days after receipt of the notice.

On May 15, 1992, plaintiff filed a timely action against the Postal Service and four employees, challenging his removal as resulting from handicap and race discrimination. *See Andress v. United States Postal Service*, Case No. C-1-92-417. Subsequently, Andress dismissed the four employees and file amended complaints. On August 21, 1992, the United States Department of Justice filed a suggestion of improper service on the remaining defendant. The Magistrate Judge ordered Andress to show cause why his complaint should not be dismissed. After Andress responded that he had served the U. S. Attorney's Office, the Magistrate

Judge advised Andress that, under Fed. R. Civ. P. 4(d)(5), he was required to serve both the United States as explained in Fed. R. Civ. P.4(d)(4) as well as the Postal Service. Attached to the order was a copy of Rule 4. Andress was ordered to properly serve the United States Postal Service within twenty days of receipt of the order and provide the Court with proof of service within thirty days. He was advised that if he failed to comply with the order, defendant's motion to dismiss would be granted. On December 23, 1992, Andress filed a "notice of bona fide attempt to serve process on the United States Postal Service," stating that he had sent by certified mail, with return receipt, a copy of a summons and complaint to the Postmaster General in Washington, D.C. The Magistrate Judge determined that Andress had not effected service of process and had not show good cause to excuse his failure. He recommended dismissal with prejudice and, on March 3, 1993, the District Judge adopted the report and recommendation. Andress appealed this ruling, and the United State Court of Appeals for the Sixth Circuit affirmed the District Court's finding that Andress failed to perfect service of process on the Attorney General within 120 days of filing his complaint and there was no good cause shown for his failure. *Andress v. United States Postal Service*, No. 93-3391 (6th Cir. Oct. 21, 1993).

While plaintiff's appeal was pending in District Court case no. C-1-92-417, he filed the instant action, which contains the same claim. Defendant's motion for summary judgment asserts this case should be

dismissed because it was not filed within the thirty day time period after the MSPB decision. At the hearing, plaintiff, who appeared pro se, demonstrated that he is an intelligent person who clearly grasped the legal issues and was capable of understanding both the Magistrate Judge's instruction given in case no. C-1-92-417 as well as the requirements of Rule 4. Both this Court and the Sixth Circuit have already determined that plaintiff has failed to show good cause for perfecting service of his complaint in a timely manner. Filing the complaint again in a new case does not cure this defect. This Court has already stretched the time limits of Rule 4 in case no. C-1-92-417 to give plaintiff an opportunity to perfect service, and he failed to do so. Plaintiff claims that the Court should consider equitable tolling, but he has provided no evidence that would support equitable tolling. Furthermore, equitable tolling is not applicable to this case. *See Dean v. Veterans Admin. Regional Office*, 943 F.2d 667, 669-70 (6th Cir. 1991).

Plaintiff's most recent complaint does not relate back to the date of his complaint in case no. 92-417. Id. The 30 day limitation period in 5 U.S.C. § 7703(b)(2) is jurisdictional and not subject to equitable tolling. Id; *Hilliard v. United States Postal Service*, 814 F.2d 325, 327 (6th Cir. 1987). Therefore, the instant complaint must be dismissed.

IT IS THEREFORE RECOMMENDED THAT:

1. Defendant's motion for summary judgment be GRANTED and plaintiff's complaint be dismissed with prejudice; and

2. Plaintiff's motions to strike, for summary judgment, and for preliminary injunction be DENIED.

Date: 02/02/94

/s/ Robert A. Steinberg
United States Magistrate Judge